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IN THE

Supreme Court of the United States

October Term, 1968
No. 750

GLENN MARTIN HARRINGTON,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the Court of Appeal of California, Second Appellate District

BRIEF FOR RESPONDENT

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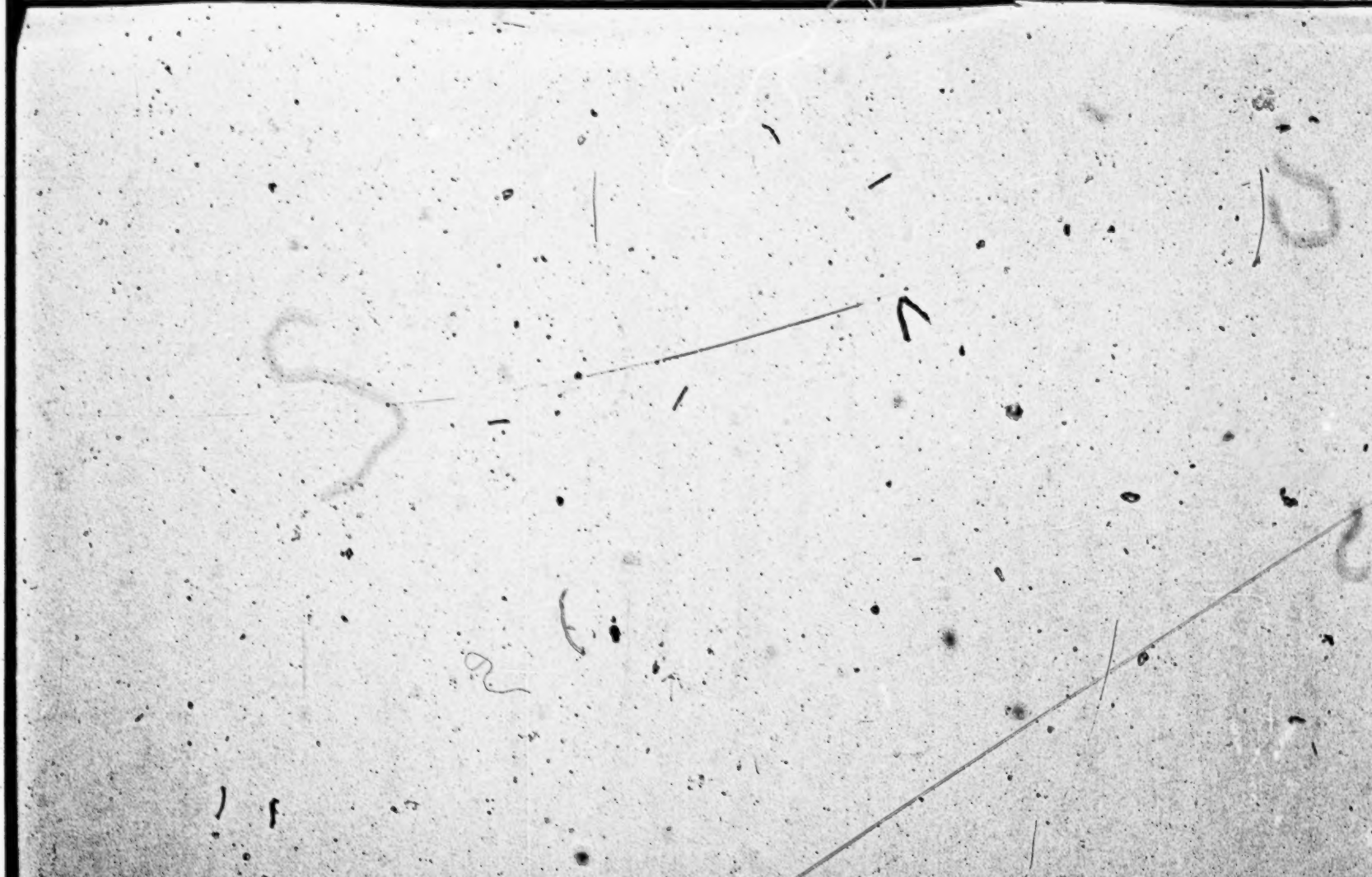

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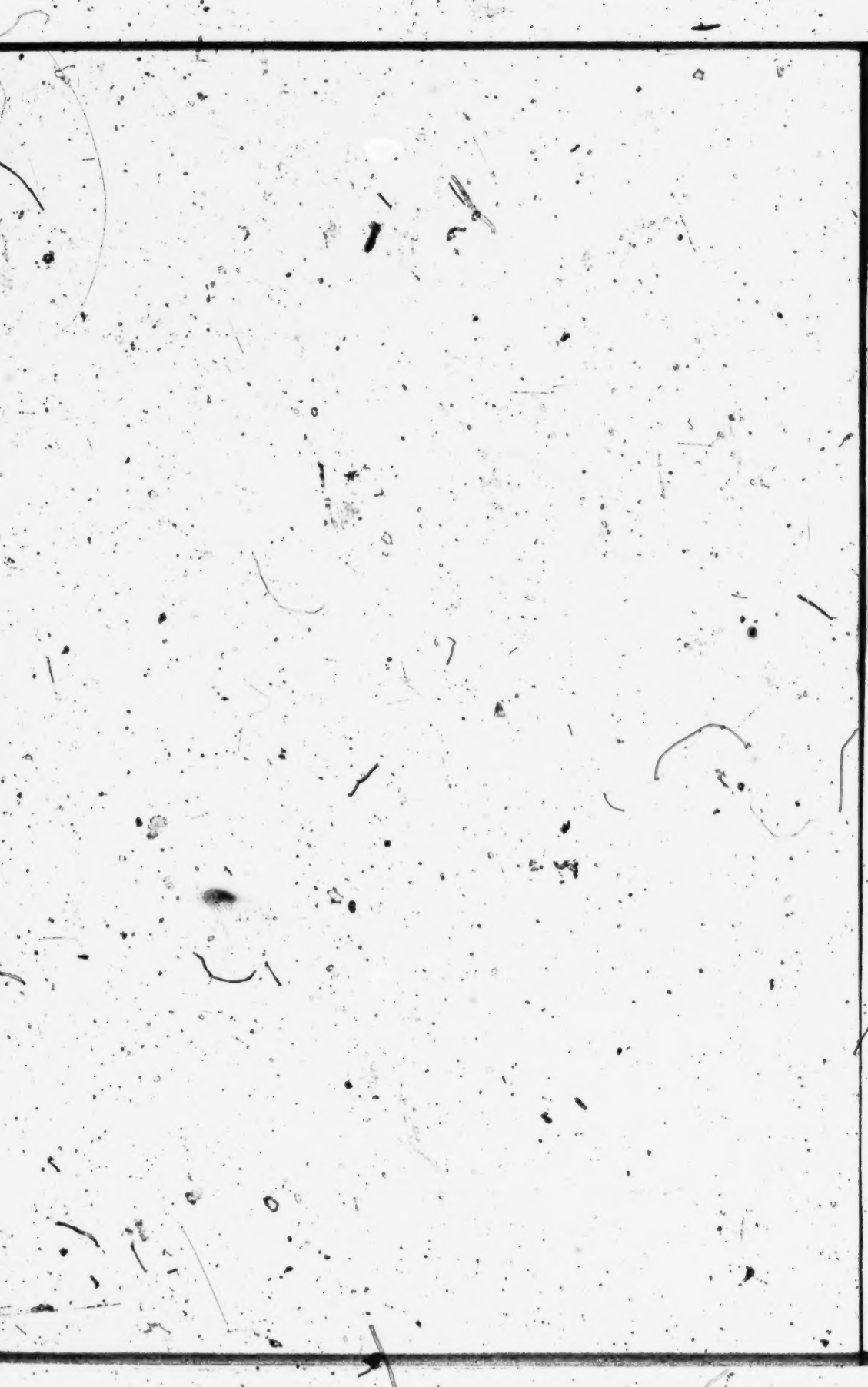
Opinion Below

These proceedings on certiorari arise out of petitioner Harrington's 1965 conviction for first degree murder. The judgment of conviction was affirmed by the Court of Appeal, Second Appellate District, Division Two, State of California, and is reported in *People v. Bosby, et al.*, 256 Cal. App. 2d 209, 64 Cal. Rptr. 159 (1967). The Supreme Court of California denied petitioner Harrington's petition for a hearing.

Jurisdiction

Jurisdiction is conferred on this Court by Title 28, section 1257(3) of the United States Code.



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Statutes Involved

Relevant statutes and constitutional amendments, federal and state are set forth in the Appendix.

Questions Presented

1. Do the extrajudicial statements of the three codefendants fall within the ban of *Bruton v. United States,* 391 U.S. 123 (1968)?

2. Should the harmless error standard as defined in *Chapman v. California,* 386 U.S. 18 (1967) be made applicable to a *Bruton* type error?

3. Was the admission of the extrajudicial statements of the three codefendants harmless as to petitioner Harrington?

4. Should the change in law effectuated by this Court in *Bruton v. United States, supra,* be afforded retroactive application?

Statement of the Case

On January 27, 1965, an information was filed in the Superior Court of Los Angeles County, charging Jesse Bosby, Gilbert Cooper, George Rhone, Jr., and petitioner Harrington with murdering Benjamin G. Serna on December 11, 1964. [R. 3-4.] All the defendants entered pleas of "Not Guilty." Each defendant was represented by separate counsel. [R. 1, 6.] Each defendant made motions to sever, which were all denied by the trial court. [R. 8-13, 29-30, 34-43, 49.] After a two-week trial, the jury found each defendant guilty of murder in the first degree. [R. 1.] Thereafter the same jury fixed the penalty for each defendant as imprisonment in the state prison for life. [R. 2.] Each defendant filed a notice of appeal. [R. 2, 428.]

The order of the Court of Appeal affirming defendants' convictions was entered on November 21, 1967. [R. 429.] The Court of Appeal's denial of a rehearing was entered on December 12, 1967. The Supreme Court of California denied a hearing on January 17, 1968. [R. 441.]

A timely petition for Writ of Certiorari was filed in this Court. The petition for certiorari was granted on November 18, 1968, in Number 750, October Term, 1968. [R. 442.]

Statement of Facts

In the afternoon of December 11, 1964, three colored men and a white man were observed to switch cars two blocks from a grocery and liquor store located at 6126 South Holmes Avenue, Los Angeles. They drove off in the second car. One man remained in the first car with the motor running. [R. 140-142, 146-147.] The witness who observed this stated that the white man had red hair. [R. 151.]

At approximately 2:15 p.m. on December 11, 1964, codefendants Jesse Bosby and Gilbert Cooper entered this store. Cooper asked the proprietor, Mrs. Ardis Allison Robbins, if she would cash a payroll check. She indicated that she would but would have to examine it first. Cooper, after reaching into his pocket, stated that he must have left his check in his car and went outside to get it. [R. 56-59, 105-107.] In the interim, Bosby engaged Darrell Ashcraft, the brother of Mrs. Robbins, in a conversation regarding a particular size bottle of wine. [R. 108, 116.]

When Cooper returned, he was followed by petitioner Harrington and codefendant George Rhone, Jr., who

took positions within the front of the store. [R. 60.] Mrs. Robbins remembered seeing them earlier outside her store, recalling in particular petitioner Harrington's bright red hair. [R. 58.] Mrs. Lottie Mae Williams, a customer who observed petitioner Harrington enter the store, also remarked about his bright red hair. [R. 123, 127-128, 132-133.] After examining Cooper's driver's license, Mrs. Robbins refused to cash the check. [R. 60-62.]

At this point, Benjamin Serna, a store employee, collided with Bosby, and both men fell down, knocking down a potato chip rack. [R. 62, 75-77.] When both men arose, Mr. Serna moved toward Mrs. Robbins in a jerking fashion as if being prodded by Bosby whom she heard say, "Man, I told you not to give me any trouble." [R. 78-79, 98-99.]

While Mrs. Robbins' attention was diverted in the direction of Bosby and Mr. Serna, Mr. Ashcraft who could not see them from his position nearer the front of the store, observed petitioner Harrington first and then Cooper draw a gun. Petitioner Harrington told Mr. Ashcraft to "Hold it." [R. 109-110.] When Mrs. Robbins observed that Bosby had a gun pressed against Mr. Serna's body, she reached for her own gun which was kept in a drawer beneath the cash register. As she drew it out, Rhone moved forward and seized her wrist and either he or Cooper removed the gun from her hand. [R. 64-65, 111-112.]

A shot rang out from the area where Bosby and Mr. Serna were located. Serna took a few steps forward with blood running from his mouth and shirt and then fell dead upon the floor. [R. 65-66.] At this time Mrs. Robbins noticed a gun in petitioner Harrington's

hand. [R. 66.] Both Mrs. Robbins and Mr. Ashcraft complied with orders to move to the rear of the store. [R. 66-67, 112.] The money in the cash register was not taken as the electric plug had been knocked out of its socket. [R. 68-69.]

Two bystanders on the street saw the defendants run to the car in which they had arrived and drive rapidly away. [R. 130-131, 158.] Mrs. Lottie Mae Williams observed petitioner Harrington get in the rear seat noting his red hair. [R. 132.] Another bystander testified that the white man had red hair. [R. 158.] The defendants were seen moments thereafter when they again switched cars at the spot nearby where the second car waited with another man behind the wheel and the motor running. [R. 143, 148.]

Subsequently, each of the defendants was arrested and each gave statements after being advised of his constitutional rights in accordance with the rules enunciated in *People v. Dorado*, 62 Cal. 2d 338, 42 Cal. Rptr. 169, 398 P. 2d 361 (1965).[1] In substance, each defendant was advised of his right to remain silent, his right to counsel, and that any statement he made could be later used against him. [R. 173-174, 271, 327, 363.]

In a statement taken by a stenographic reporter, Cooper stated that he went into a liquor store to cash a check. [R. 202-203.] Three people came in behind him. One of them hit an old man, who grabbed a bottle. The man told the old man to stop, and when the old

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[1]Since this case was tried before *Miranda v. Arizona*, 384 U.S. 436 (1966), the standards enunciated in *People v. Dorado*, 62 Cal. 2d 338 (1965), are applicable. *See Johnson v. New Jersey*, 384 U.S. 719, 733 (1966).

man did not, he shot him. [R. 204-205.] When the lady behind the cash register reached for a gun, Cooper grabbed her arm so that the man would not shoot her. [R. 208-209.] Cooper raced to his car, and the other three jumped into the car. [R. 210.] A white boy said, "Get it out of here, let's get out of here." [R. 211.] After driving two blocks, another man told Cooper to stop. [R. 213.] Here the other men entered a green 1957 Ford. [R. 247.] Cooper denied conspiring to rob the liquor store at 6126 Holmes Avenue in Los Angeles or knowing the other three men. [R. 264.] The trial court advised the jury that this statement was only to be received against Cooper and not as to any other defendant. [R. 244-245.]

At a later time, Cooper admitted to the police that he and Bosby discussed robbing a market; that the four of them drove to a market; that he presented his check for cashing; that he saw Bosby hit an old man; that he heard a gunshot; and that all four of them ran from the store and got into his vehicle. [R. 321-323.] The trial court advised the jury that this statement was only to be received against Cooper and not as to any other defendant. [R. 321.] In relating both of Cooper's statements, the officer did not mention petitioner Harrington's name but he did refer to "this white guy," "white boy" and a "white man," [R. 205, 211, 251, 259, 264, 322-323.]

In a statement taken by a stenographic reporter, Bosby indicated that he and Cooper discussed getting money at the Robbins' market. [R. 275.] They met two others who joined in the plot. [R. 276.] When they entered this market, Bosby went to the beer box. Cooper attempted to cash a check. [R. 278.] Bosby got into an argument with an old man. The old man threw a

can of tomatoes at Bosby. [R. 280.] After the old man ran, Bosby heard a pop. [R. 281.] Bosby observed two revolvers in the hands of his companions. He ran out of the store and got in Cooper's car. [R. 284-285.] Bosby denied either possessing a gun or shooting the old man. [R. 310.] Bosby stated that he did not know the Caucasian's name and he described him as a "blond-headed fellow." [R. 286.] The trial court advised the jury that this statement was only received against Bosby and not as to any other defendant. [R. 273.]

In a statement taken by a stenographic reporter, Rhone admitted to the police that he and the other three codefendants discussed "knocking over" the market. The officer reading this statement mentioned the names of the three codefendants, which included petitioner Harrington. [R. 340-341.] They went in two separate cars to rob the market. [R. 342.] Rhone was supposed to watch inside the market. [R. 344.] Rhone was the last one to enter the store. Bosby and an old man got into a scuffle. [R. 345.] When the lady at the cash register pulled a gun, Rhone grabbed her arm and Cooper grabbed the gun out of her hand. [R. 347.] He heard a shot ring out. [R. 348.] He saw an old man stumble, fall, get up again, and start running. Bosby and Cooper tried to get into the cash register, but were unable to pull the drawer open. All of them ran out of the market and got in Cooper's car. [R. 351-352.] The trial court advised the jury that this statement was only to be received against Rhone and not as to any other defendant. [R. 338.]

In his statement to the police, petitioner Harrington said that he and three Negro companions drove to a market; that while he stayed in the car, the three colored fellows entered the store; that he later entered the store

to purchase cigarettes; that he fled with them after the murder; and that thereafter he had dyed his hair black and shaved off his moustache. [R. 363-365.] The trial court advised the jury that this statement was only to be received against petitioner Harrington and not as to any other defendant. [R. 363.]

Rhone was the only defense witness. He testified that it was not his intention to commit a robbery when he entered the market on December 11, 1964. He only wanted to "case" the place. Previously, he had discussed holding it up. [R. 387, 389.]

Summary of Argument

1. The extrajudicial statements of the three codefendants do not fall within the ban of *Bruton v. United States*, 391 U.S. 123 (1968). Since Rhone was cross-examined by petitioner Harrington's trial counsel, the admission of Rhone's confession did not deny petitioner Harrington his constitutional right to be confronted with the witnesses against him. The extrajudicial statements of Bosby and Cooper only refer to a "male white," "white guy," etc. Such references do not necessarily implicate petitioner Harrington. In fact the description of the white man in Bosby's statement does not fit that of petitioner Harrington.

2. Irrespective of the applicability of *Bruton*, the admission into evidence of three codefendants' extrajudicial statements does not automatically require a reversal of petitioner Harrington's conviction. The vast majority of the cases which have discussed this issue have ruled that the rule in *Bruton* is subject to a harmless error standard. Both logic and sound policy support the majority view, for there are significant variables in codefendants' extrajudicial statements with respect

to their inculpating effect and whether they added critical weight to the prosecution's case.

3. Under the harmless error standard as defined in *Chapman v. California*, 386 U.S. 18, 24 (1967), petitioner Harrington was not prejudiced by the admission of the three codefendants' extrajudicial statements. The case against petitioner Harrington was exceedingly strong, for this was no circumstantial evidence case. Three prosecution eye-witnesses were positive about petitioner Harrington's identification. Petitioner Harrington admitted to the police that he fled with three Negroes after the murder, and that thereafter he had dyed his hair black and shaved off his moustache.

Petitioner Harrington was not denied his Sixth Amendment right of confrontation with respect to codefendant Rhone's confession. Rhone took the stand in his own defense and was cross-examined by petitioner Harrington's trial counsel.

With regard to the extrajudicial statements of Bosby and Cooper, besides the fact that they do not name petitioner Harrington, they furnish few details of the white man's role in the robbery. In view of the exceedingly strong prosecution evidence and the lack of specificity about the white man's robbery role in Bosby's and Cooper's statements, the admission of these statements was harmless as to petitioner Harrington.

4. Respondent respectfully requests that this Court reconsider the retroactivity ruling of *Roberts v. Russell*, 392 U.S. 293 (1968). A reweighing and a rebalancing of the three relevant considerations enunciated in *Stovall v. Denno*, 388 U.S. 293, 296-97 (1967), leads inevitably to the conclusion that *Bruton* should be denied retroactive application.

ARGUMENT

I

The Extrajudicial Statements of the Three Codefendants Do Not Fall Within the Ban of Bruton.

In *Bruton v. United States*, 391 U.S. 123 (1968), the confrontation clause of the Sixth Amendment was held violated where a codefendant's confession was used against Bruton in a federal prosecution. The codefendant who implicated Bruton was not a witness in the trial. The Court held that an instruction that the confession was only to be considered as against the maker, was not an adequate substitute for Bruton's constitutional right of cross-examination. The codefendant had confessed that he and Bruton had committed an armed postal robbery which statement, the Court said, was powerfully incriminating. The Court held in *Bruton*, and made even more clear in the concurring opinion of Mr. Justice Stewart, that the rationale of the Sixth Amendment's confrontation clause is to exclude damaging extrajudicial statements of a codefendant who is not subject to cross-examination.

Here, Jesse Bosby, Gilbert Cooper, George Rhone, Jr. and petitioner Harrington made statements to the police which were admitted into evidence at their joint trial. Each statement will be examined in some detail in Argument III, *infra*, pp. 18 through 24.

For the purpose here, it is sufficient to point out that codefendant Rhone's statement, which is a confession, is the only one that mentions petitioner Harrington's name. But in regard to Rhone's confession, he took the witness stand and was cross-examined by pe-

titioner Harrington's trial counsel. [See R. 419-420.] Thus, it appears that the confrontation rationale of *Bruton* would not seem to be applicable to Rhone's confession. Since Rhone was cross-examined by petitioner Harrington's trial counsel, the admission of Rhone's confession did not deny petitioner Harrington's constitutional right to be confronted with the witnesses against him. *See People v. Willis,* 30 A.D. 2d 817, 292 N.Y.S. 2d 298 (1968); *People v. Burwell,* 30 A.D. 2d 842, 292 N.Y.S. 2d 965 (1968); *People v. Camarilla,* 266 Cal. App. 2d ....., 266 A.C.A. 555, 567-68, 72 Cal. Rptr. 296, 303 (1968); *People v. Curry,* 265 Cal. App. 2d ...., 265 A.C.A. 894, 899, 71 Cal. Rptr. 573, 576, n. 2 (1968); *United States v. Hoffa,* 402 F. 2d 380, 386-87 (1968); *State v. Fox,* .... N.C. ...., 163 S.E. 2d 492, 502 (1968); *People v. Flowers,* 1 N.C.A. 612, 162 S.E. 2d 34 (1968); *But cf. United States v. Guajardo-Melendez,* 401 F. 2d 35, 38, n. 5 (7th Cir. 1968); *People v. Scott,* ..... Ill. App. 2d ....., 241 N.E. 2d 579, 583 (1968).

As to the three statements of Bosby and Cooper (two of which are confessions), they only refer to a "male white," "white guy," "Caucasian," etc. and do not name petitioner Harrington. Such broad references do not necessarily implicate petitioner Harrington. In fact Bosby's statement describes the white man as a "blond-headed fellow" [R. 286], which does not fit the description of petitioner Harrington's bright red hair. Obviously, if the jury literally believed Bosby's description, they would think someone other than petitioner Harrington was involved. The situation which we are presently considering is entirely different from the "powerfully incriminating statements" in *Bruton. Id.* at 135.

In view of the foregoing, respondent submits that the extrajudicial statements of the three codefendants do not fall within the ban of *Bruton*.

II

Irrespective of the Applicability of Bruton, the Rule in Bruton Is Subject to the Chapman Harmless Error Standard

Regardless of the applicability of *Bruton* to the instant case, respondent urges that the rule in *Bruton* is subject to the harmless error standard as defined in *Chapman v. California*, 386 U.S. 18, 24 (1967). As this Court pointed out in *Bruton*, "not every admission of inadmissible hearsay can be considered to be reversible error unavoidable through limiting instructions; instances occur in almost every trial where inadmissible evidence creeps in, usually inadvertently. 'A defendant is entitled to a fair trial but not a perfect one.' (Citations.)" *Id.* at 135.

In discussing this issue, the California Supreme Court stated in *People v. Flores*, 68 Cal. 2d 563, 568, 68 Cal. Rptr. 161, 164, 440 P. 2d 233, 236 (1968), that the *Chapman* harmless error standard is applicable where a codefendant's extrajudicial statement which implicates the defendant is improperly admitted into evidence. This case specifically rejected a prejudicial *per se* rule. (68 Cal. 2d at 568, 68 Cal. Rptr. at 164, 440 P. 2d at 236, n. 5.) Other state cases have also expressly reached the same conclusion with regard to the applicability of *Chapman*. *People v. Ortiz*, 30 A.D. 2d 510, 294 N.Y.S. 2d 625 (1968); *People v. DeVine*, 57 Misc. 2d 862, 293 N.Y.S. 2d 691 (1968); *see also, People v. Camarillo*, 266 Cal. App. 2d ....., 266 A.C.A. 555, 567-

69, 72 Cal. Rptr. 296, 303-04 (1968); *People v. Schwartzman*, 266 Cal. App. 2d ...., 266 A.C.A. 948, 965-66, 72 Cal. Rptr. 616, 627-28 (1968); *People v. Curry*, 265 Cal. App. 2d ....., 265 A.C.A. 894, 899-901, 71 Cal. Rptr. 573, 575-76 (1968); *but cf. People v. Barrett*, 267 Cal. App. 2d ....., 267 A.C.A. 154, 164, 72 Cal. Rptr. 681, 687 (1968), where it was held that in the absence of a confession from the defendant, the admission of a codefendant's statement incriminating defendant, if error, was necessarily prejudicial.

Two federal cases have explicitly indicated that *Chapman* is applicable in a *Bruton* type of situation. *United States v. Lipowitz*, 401 F. 2d 591, 593 (3rd Cir. 1968); *United States ex rel. Johnson v. Yeager*, 399 F. 2d 508, 511 (3d Cir. 1968) (U.S. appeal pending); *see also, Evans v. Dutton*, 400 F. 2d 826, 828, 829, nn. 4 and 15 (5th Cir. 1958).

Although all but one of the following cases were reversed, they each cite *Bruton* and fairly indicate by the language used in the decision that a *Bruton* type error is not automatically reversible; *People v. Miller*, 40 Ill 2d 154, 158-59, 238 N.E. 2d 407, 409 (1968, U.S. appeal pending); *People v. Boone*, 22 N.Y. 2d 476, 293 N.Y.S. 2d 287, 239 N.E. 2d 885 (1968); *United States v. Guajardo-Melendez*, 401 F. 2d 35, 38-39 (7th Cir. 1968); *Atwell v. United States*, 398 F. 2d 507, 510-11 (5th Cir. 1968); *People v. Willis*, 30 A.D. 2d 817, 292 N.Y.S. 2d 298 (1968); *People v. McKendall*, 30 A.D. 2d 717, 290 N.Y.S. 2d 987 (1968); *People v. Pilon*, 30 A.D. 2d 365, 293 N.Y.S 2d 393 (1968).

Two federal cases decided before *Bruton* clearly hold that a *Bruton* type error was federal constitutional error which was subject to a harmless error rule. *Hoop-*

er v. Swenson, 401 F. 2d 352 (8th Cir. 1968); *United States v. Beatty,* 282 F. Supp. 202, 215-16 (D. Md. 1968).

In *Commonwealth v. Myers,* 429 Pa. 378, 239 A. 2d 805 (1968), the Supreme Court of Pennsylvania noted that *Bruton's* petition for certiorari had been granted. (239 A. 2d 808, n. 6.) It held that an involuntary confession of a codefendant implicating the defendant was "equivalent to an involuntary confession (by defendant), thus placing this error within the ambit of the automatic reversal doctrine." (239 A. 2d 808-09, n. 7.) Since this case involved an involuntary confession, it is distinguishable from the instant case.

Some cases have summarily reversed on the basis of *Bruton* without discussing the applicability of any harmless error standard. *E.g, United States v. Lyon,* 397 F. 2d 505, 510 (7th Cir. 1968); *United States v. Kelly,* 399 F. 2d 692 (3d Cir. 1968); *People v. Fox,* .... N.C. ...., 163 S.E. 2d 492, 502 (1968); *Branch v. State,* 212 So. 2d 29, 32-33 (Fla. 1968); *Gelis v. State,* 215 So. 2d 86 (Fla. 1968); *People v. Burwell,* 30 A.D. 2d 842, 292 N.Y.S. 2d 965 (1968).

Thus it appears that the vast majority of the cases which have discussed this issue have ruled that a *Bruton* type error is not automatically reversible. Respondent submits that logic and sound policy support the majority view. The extrajudicial statements discussed in these cases reflect material variances with respect to their inculpating effect [*E. g., People v. Flores,* 68 Cal. 2d 563, 568, 68 Cal. Rptr. 161, 164, 440 P. 2d 233, 236 (1968)], and whether they added critical weight to the prosecutor's case. [*E.g., Atwell v. United States,* 398 F. 2d 507, 510 (5th Cir. 1968); *People v. Willis,*

30 A.D. 2d 817, 292 N.Y.S. 2d 298 (1968).] Because of such significant variables, the rule in *Bruton* should be made subject to a harmless error rule. To rule otherwise would mean that convictions would be reversed for errors that conceivably played no part in the verdicts.[2]

The effect of *Bruton* is to make certain hearsay evidence inadmissible, despite limiting instructions. *Id.* at 128, n. 3. The rationale given for this holding is that there is a substantial risk that a jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining a petitioner's guilt. *Id.* at 126. Yet there are individual cases where a jury can follow such limiting instructions. *See United States v. Hoffa,* 402 F. 2d 380, 387 (7th Cir. 1968). The rule in *Bruton* is not so basic to a fair trial that an infraction can never be treated as harmless error, such as in a coerced confession case or a deprivation of the right to counsel. *Cf. Chapman v. California, supra,* at 23, n. 8.[3]

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[2]See Bybee, Jr., *A Comment on Application of the Harmless Constitutional Error Rule to "Confession" Cases,* 1968 Utah Law Review 144, 153; wherein the applicability of the harmless error rule is discussed as to confessions obtained in violation of *Escobedo v. Illinois,* 378 U.S. 478 (1964) and *Miranda v. Arizona,* 384 U.S. 436 (1966). It is there concluded: "Without a harmless constitutional error rule, otherwise valid convictions would have to be reversed due solely to the presence of what might be insignificant evidence."

[3]In the instant case, all defendants were advised of their *Dorado* constitutional rights before they made their extrajudicial statements as contrasted with the co-defendant in *Bruton. Id.* at 124, n. 1. The codefendant's confession in *Bruton* was in-

(This footnote is continued on the next page.)

Utilization of the harmless error rule is a reasonable means of avoiding inundation of the courts on this issue. A fully retroactive *Bruton* which is not subject to a harmless error rule will cause many collateral attacks on old convictions. Again, such convictions could be overturned on collateral attack for errors that played no part in the judgment. To require a general release of such prisoners would cripple the orderly administration of criminal law, since their cases would afford the least likelihood of a successful retrial (stale evidence, missing witnesses, etc.).

Moreover, it is interesting to note the language contained in *Gilbert v. California,* 388 U.S. 263 (1967). There the trial court admitted into evidence an accomplice's pretrial statements which referred to petitioner 159 times in the course of reciting petitioner's role in the robbery and murder. Petitioner asked this Court to reconsider *Delli Paoli v. United States,* 352 U.S. 232 (1957). In response to this request, this Court stated:

> ". . . We have no occasion to pass upon this contention. The California Supreme Court has rejected the Delli Paoli rationale, and relying at least in part on the reasoning of the Delli Paoli dissent, regards cautionary instructions as inadequate to cure prejudice. *People v. Aranda,* 63 Cal. 2d 518, 407 P. 2d 265. The California court applied Aranda in this case but held that any error as to

admissible even against the declarant. It is easy to see that since the prosecution's reason for introducing the codefendant's confession in *Bruton* was negatived by its inadmissibility, there was nothing against which to balance the possible risk of prejudice to the non-declarant.

> Gilbert in the admission of King's statements was harmless. The harmless-error standard applied was that 'there is no reasonable possibility that the error in admitting King's statements and testimony might have contributed to Gilbert's conviction,' a standard derived by the court from our decision in Fahy v. Connecticut, 375 U.S. 85. (Footnote omitted.) Fahy was the basis of our holding in Chapman v. California, 386 U.S. 18, and the standard applied by the California court satisfies the standard as defined in Chapman.
>
> "It may be that the California Supreme Court will review the application of its harmless-error standard to King's statements if on the remand the State presses harmless error also in the introduction of the in-court and lineup identifications. However, this at best implies an ultimate application of Aranda and only confirms that petitioner's argument for reconsideration of Delli Paoli need not be considered at this time." (388 U.S. 263, 268.)

The fair import of these remarks would suggest that the erroneous admission of a codefendant's statement which implicates a defendant is not automatically reversible. This is especially true when viewed in light of the retroactivity holding of *Roberts v. Russell,* 392 U.S. 293 (1968). (See discussion in Argument IV, *infra,* pp. 24 through 30.) Accordingly, it is submitted that the *Chapman* harmless error standard is applicable to a *Bruton* type error.

III

The Admission of the Three Codefendants' Extrajudicial Statements Was Harmless to Petitioner

The next issue to be determined is whether the admission of the three codefendants' extrajudicial statements may be termed harmless error under *Fahy v. Connecticut,* 375 U.S. 85 (1963) as exposited by *Chapman v. California,* 386 U.S. 18 (1967). In speaking of harmless error, this Court said in *Fahy v. Connecticut, supra,* at 86-87:

> ". . . We are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of. The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction. . . ."

In *Chapman v. California, supra,* at 24, this Court said in explaining *Fahy:*

> ". . . We, therefore, do no more than adhere to the meaning of our Fahy case when we hold, as we now do, that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."

The Court also held that the burden was on the beneficiary of the error to make this showing.

Also, in *Chapman,* it is stated:

> ". . . And though the case in which this occurred presented a reasonably strong 'circumstantial web of evidence' against petitioners, (citation omitted), it was also a case in which, absent the constitu-

tionally forbidden comments, honest, fair-minded jurors might very well have brought in not guilty verdicts." (386 U.S. at 25-26.)

Under the foregoing criteria, it is respondent's contention that any error committed in admitting the three codefendants' extrajudicial statements was harmless as to petitioner Harrington. The case against petitioner Harrington was exceedingly strong, for this was no circumstantial evidence case. *Cf. Chapman v. California, supra.* As noted in the opinion of the California Court of Appeal, codefendants Rhone, Cooper and Bosby were readily identified as Negroes while Harrington was originally described as either white or a very light-skinned Negro. *People v. Bosby,* 256 Cal. App. 2d 209, 212, 64 Cal. Rptr. 159, 161, n. 2 (1967). The two victims, Mrs. Robbins and Darrell Ashcraft, both identified petitioner as one of the robbers who had drawn a gun. [R. 66, 109.] Petitioner Harrington ordered Ashcraft to "Hold it." [R. 109-110.] Mrs. Robbins mentioned petitioner Harrington's bright red hair. [R. 58.] A customer who had observed petitioner Harrington enter and leave the store identified petitioner Harrington and also remarked about his bright red hair. [R. 123, 127-128, 132-133, 137.] These three prosecution witnesses were positive in their identification of petitioner Harrington.

In addition, another witness who had observed three colored men and a white man switch cars shortly before the robbery testified that the white man had red hair. [R. 151.] A bystander who had observed the escape of the four robbers in an automobile testified that the white man had red hair. [R. 158.]

Furthermore, petitioner Harrington made some very incriminating statements to the police. He admitted that he was the red-haired man who had entered the store with his three Negro companions; that he fled with them after the murder; and that thereafter he had dyed his hair black and shaved off his moustache. [R. 363-365.] Respondent contends that such admissions can be used in the context of determining harmless error. *See People v. Charles,* 66 Cal. 2d 330, 343-44, 57 Cal. Rptr. 745, 425 P. 2d 545 (1967); *People v. Lara,* 67 Cal. 2d 365, 392-93, 62 Cal. Rptr. 586, 605, 432 P. 2d 202 (1967).

As indicated in the opinion of the California Court of Appeal, after the constitutionally admissible evidence is reviewed ". . . it is virtually inconceivable that any jury could have escaped the conclusion that Harrington was engaged in an attempted robbery and was answerable for the murder committed by his co-conspirator in the course thereof." *People v. Bosby,* 256 Cal. App. 2d 209, 217, 64 Cal. Rptr. 159, 164-65 (1967). In the language of *Chapman,* it is clear that, in the absence of the extrajudicial statements of the three codefendants, no honest, fair-minded jury could have brought in any other verdict other than guilty.

Petitioner Harrington has added all the pages of the extrajudicial statements of the three codefendants in the State Reporter's Transcript and has come out with a total of 171 pages. But these extrajudicial statements should be closely examined as to their references to petitioner Harrington.

Cooper's first statement was taken by a stenographic reporter. Cooper stated that "this white guy" was in the store when another man hit the old man. [R. 205.]

Cooper next stated that "the white boy" got in the front seat of his vehicle and said "Get it out of here, let's get out of here." The white boy did not have anything in his hands while the two colored boys had guns. [R. 211.] "This white man" and a Negro fellow nearly by-passed Cooper's vehicle before entering his car. [R. 251.] Cooper stated that "the white and the colored guy" were behind him while Cooper was in the store. [R. 258-259.] Cooper stated that the Caucasian had no colored blood in him. In this statement Cooper denied conspiring to rob this store. He denied knowing or even seeing before the other three persons who participated in the robbery. [R. 264.]

In Cooper's second statement, which was a confession, he stated that when he entered the store a second time to attempt to cash a pay check, Bosby, a tall white man, and a tall Negro fellow walked in behind him. Previously the four of them had driven to this store in Cooper's vehicle. After a gunshot, all four of them ran back to his vehicle. The white man sat in the rear seat. He described the white man as being approximately thirty years old, five eleven, and approximately 150 to 160 pounds. [R. 321-323.] Petitioner's name was not mentioned in either statement.

In a statement taken by a stenographic reporter, Bosby stated that he and Cooper met a male Negro and a male white two blocks from the market. [R. 276.] Bosby was the one who was supposed to get the money while the other three were supposed to see that everything was okay. [R. 277.] Bosby said that the Caucasian was a blond-headed fellow who was in his early thirties and was about five nine. Bosby did not even know the Caucasian's first name. [R. 286.] Later he

unintentionally met the Caucasian while walking on Wilmington Boulevard. Subsequently, he saw "the white g[illegible] in a Buick. [R. 289-290.] Bosby stated he never saw the Caucasian with a gun. A person named Charles told Bosby that the Caucasian was the type of person who wanted to make money and would not welsh on a business deal. [R. 296.] The "patty" was one of five people who got into two cars. [R. 301.] Charles and "the patty" walked toward the store together. [R. 302.] Bosby presumed that "the patty" entered the store with Charles. [R. 304.] Bosby did not know where "the patty" was in the store at the time of the gunshot. [R. 305.]

In a statement taken by a stenographic reporter, Rhone stated that he knew a male Caucasian by the name of Glen. [R. 339.] Glen was present when the four defendants discussed "knocking over" a market. [R. 340-341.] They drove to the vicinity of this market in two cars, with Rhone going in Glen's car. [R. 342.] Glen stated that he had a gun. [R. 343.] Petitioner Harrington and Cooper were standing in front of the cash register. [R. 344-345.] Glen and Rhone entered the store together. [R. 345.] At the time of the scuffle between Bosby and the old man, petitioner Harrington was standing next to Rhone. [R. 346.] When Cooper took the gun from the lady, petitioner Harrington was next to Rhone. [R. 348.] Rhone never saw Glen have his gun out. [R. 349.] Glen did not go over to the cash register and attempt to open it. [R. 351.] Glen got in the back seat of Cooper's vehicle. Glen is all white. The four defendants went three blocks and got into Glen's 1952 Ford. [R. 353.] Glen, the driver, proceeded to Rhone's house. [R. 355.] Rhone and Bosby

met Glen later that afternoon. [R. 356.] Glen was armed with a .22 for a while in the market. Rhone took Glen's gun when the lady went for a gun. [R. 358.] Rhone identified the gun that belonged to Glen. [R. 359]. Glen had not seen the market before the robbery. [R. 360.]

Rhone's confession is the only one that mentions petitioner Harrington's name and goes into detail about his role in the abortive robbery. But in regard to Rhone's confession, he took the witness stand in his own defense and was cross-examined by petitioner Harrington's trial counsel. [R. 419-420.] Thus *Bruton* does not apply to Rhone's confession. (See discussion in Argument I, *supra,* pp. 10 through 12.)

As to the extrajudicial statements of Bosby and Cooper, they do not name petitioner Harrington, although they do refer to a "male white," "white guy," "white man," etc. which does not necessarily implicate petitioner Harrington. In fact, Bosby's statement, which is a confession, describes the white man as a blond-headed fellow [R. 286], which does not fit the description of petitioner Harrington's bright red hair. Cooper's first statement [R. 199-214, 245-265.] was not a confession, since he denied being involved in the robbery. [R. 264.] It is hardly likely that the jury placed much credence in Cooper's first statement in view of his denial of guilt and his denial of knowing the other defendants. Cooper's second statement, which is a confession, is only three pages long. [R. 321-323.] The details of the white man's role in the robbery and the description of what he exactly did while in the store is extremely limited in both of Cooper's statements. This is also true of Bosby's statement. In this

connection, both Bosby and Cooper stated that they did not see petitioner Harrington with a gun [R. 211, 296], which is at variance with the testimony of the prosecution witnesses.

In comparison with Bosby's and Cooper's statements, the prosecution percipient witnesses provided the jury with many additional facts as to petitioner Harrington's activities while in the market. In view of the exceedingly strong prosecution evidence and the lack of specificity about the white man's robbery role in Bosby's and Cooper's statements, it is submitted that beyond a reasonable doubt petitioner Harrington would have been convicted if these statements had not been received into evidence. Or in other words, there is no reasonable possibility that Bosby's and Cooper's incriminating statements might have contributed to petitioner Harrington's conviction, for no honest, fair-minded jury could have brought in another verdict other than guilty. *See Chapman v. California, supra.*

IV

The Holding in Roberts v. Russell Should Be Re-examined as to the Retroactivity of Bruton v. United States

We respectfully urge that this Court reconsider *Roberts v. Russell*, 392 U.S. 293 (1968), where it was held that *Bruton v. United States*, 391 U.S. 123 (1968) was to be given complete and unqualified retrospective application. This is the first instance that we are aware of where a respondent has had an opportunity to present its views on this issue in a case to be formally argued before this Court. In several recent cases this Court has denied retroactive application to constitu-

tional rules of criminal procedure established by innovative decisions which overruled cases sanctioning former practice. *De Stefano v. Woods*, 392 U.S. 631 (1968); *Stovall v. Denno*, 388 U.S. 293 (1967); *Johnson v. New Jersey*, 384 U.S. 719 (1966); *Tehan v. Shott*, 382 U.S. 406 (1966); *Linkletter v. Walker*, 381 U.S. 618 (1965).

In *Stovall v. Denno, supra*, at 297, this Court stated the considerations that affect the judgment whether a case reversing prior doctrines in the area of the criminal law should be applied only prospectively:

> ". . . (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."

Respondent strongly urges that a reweighing and a rebalancing of these three relevant considerations leads inevitably to the conclusion that *Bruton* should be denied retroactive application.

The purpose of this Court in *Bruton* was to enhance the reliability of the fact-finding process. But this conclusion in itself does not compel a retroactive application of the new doctrine. As the Court said in *Johnson v. New Jersey, supra*, 384 U.S. at 728-29:

> "Finally, we emphasize that the question whether a constitutional rule of criminal procedure does or does not enhance the reliability of the fact-finding process at trial is necessarily a matter of degree. . . . We are thus concerned with the question of probabilities and must take account, among other factors, of the extent to which other safeguards are available to protect the integrity of the truth-determining process at trial."

In this regard, *Stovall v. Denno, supra,* limited the applicability of the new exclusionary rule articulated in *United States v. Wade,* 388 U.S. 218 (1967), and *Gilbert v. California,* 388 U.S. 263 (1967), to lineups which were conducted prior to the date of those decisions. This Court did so notwithstanding the fact that the new rule was one which went to the reliability of the fact-finding process at trial, stating:

> ". . . A conviction which rests on a mistaken identification is a gross miscarriage of justice. The Wade and Gilbert rules are aimed at minimizing that possibility by preventing the unfairness at the pretrial confrontation that experience has proved can occur and assuring meaningful examination of the identification witness' testimony at trial. Does it follow that the rules should be applied retroactively? We do not think so."
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> *Stovall v. Denno, supra,* at 297.

In *Bruton,* this Court felt that the California Supreme Court's reasoning in rejecting *Delli Paoli* in *People v. Aranda,* 63 Cal. 2d 518, 529, 47 Cal. Rptr. 353, 358-59, 407 P. 2d 265, 271-72 (1965) was sound and persuasive. Yet in *Roberts,* the Court ignored the reasoning of that same court in *People v. Charles,* 66 Cal. 2d 330, 333, 57 Cal. Rptr. 745, 747, 425 P. 2d 545, 547 (1967), wherein *Aranda* was held not to be retroactive since the former procedure did not create a grave risk of convicting innocent defendants. Since the California Supreme Court concluded that the admission of a codefendant's confession did not affect the integrity of the fact-finding process, and because this Court specifically relied upon *Aranda* in overruling *Delli Paoli,* it would seem that the California Supreme

Court's conclusion as to retroactivity would be persuasive.[4]

Under the former California practice, appropriate limiting instructions had to be given whenever an extrajudicial statement only against the declarant was to be used in a joint trial. With respect to the ability of the jury to follow such limiting instructions, this Court said in *Opper v. United States*, 348 U.S. 84, 95 (1954).

> ". . . The trial judge here made clear and repeated admonitions to the jury at approximate times that Hollifield's incriminatory statements were not to be considered in establishing the guilt of the petitioner. (Footnote omitted.) To say that the jury might have been confused amounts to nothing more than an unfounded speculation that the jurors disregarded clear instructions of the court in arriving at their verdict. Our theory of trial relies upon the ability of a jury to follow instructions. . . ."

With regard to the impact which the former California practice may have had on the integrity of the fact-finding process at trial, it is significant that the use of such statements in a joint trial was carefully circumscribed to avoid prejudice to non-confessing defendants. "Where, however, statements of a codefendant are admitted which are irrelevant or unnecessary in establishing a case against him and are extremely prejudicial and inadmissible hearsay as to a codefendant, they should be excluded from evidence." *People v. Foote*, 48 Cal. 2d 20, 23, 306 P. 2d 803, 805

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[4] A similar conclusion was reached by the New Jersey courts. Before *Bruton*, *Delli Paoli* was rejected in *State v. Young*, 46 N.J. 152, 215 A. 2d 352 (1965). *Young* was cited with approval in *Bruton*. *Id.*, 391 U.S. 123, 129-30, n. 4. This new rule was held not to be retroactive in *State v. Blanchard*, 98 N.J. Super. 22, 235 A. 2d 913, 916 (1967).

(1957). *See also, People v. Chavez,* 50 Cal. 2d 778, 790, 329 P. 2d 907, 914-15 (1958).

Therefore, we submit that the former California practice was attended by effective safeguards which ensured the integrity of the truth-determining process at trial. Under these circumstances, the probability that this former practice resulted in any improper conviction is extremely small and furnishes little support for a decision imposing *Bruton* retroactively. Particularly so, when this limited probability is weighed against the prior justified reliance upon the old standards and the tremendous impact which retroactivity would have upon the administration of justice.

For over seventy years, this Court has steadfastly adhered to the proposition that any prejudice resulting from a codefendant's admission or confession could be avoided by instructions to the jury. *E.g., Sparf v. United States,* 156 U.S. 51, 58 (1895); *United States v. Ball,* 163 U.S. 662, 672 (1896); *Opper v. United States, supra; Delli Paoli v. United States,* 352 U.S. 232 (1957). This same issue was presented to this Court in such recent cases as *Johnson v. New Jersey,* 384 U.S. 719, 735 (1966)[5] and *Gilbert v. California,* 388 U.S. 263, 268 (1967), where this Court declined to rule on the issue. Also, this Court endorsed the *Delli Paoli* rule in *Spencer v. Texas,* 385 U.S. 554, 562 (1967).

Yet in *Roberts,* this Court declared:

> ". . . The element of reliance is not persuasive, for Delli Paoli has been under attack from its inception, and many courts have in fact rejected it." *Id.,* at 295.

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[5] *Johnson v. New Jersey,* Brief and appearance of Counsel (Brief for Petitioner), 16 L. Ed. 2d 1327, 1328 (1967).

In *Bruton,* this Court stated that the *Bruton* holding was foreshadowed by *Jackson v. Denno,* 378 U.S. 368 (1964). Id., at 128-131.) But as late as January of 1967, this Court endorsed *Delli Paoli* in *Spencer* and in June of 1967 refused to reconsider *Delli Paoli* in *Gilbert.* Certainly, in light of *Gilbert* and *Spencer,* it would have been difficult to predict the demise of *Delli Paoli.*

The consequential reliance upon these decisions by state and federal prosecutors cannot be justly ignored: As stated in *Linkletter v. Walker,* 381 U.S. 618, 636 (1965), the past cannot always be erased by a new judicial declaration. Because of this, respondent suggests that this Court adopt a similar retroactivity ruling as in *Johnson v. New Jersey,* 384 U.S. 719, 733 (1966). If such a rule were adopted, then the cutoff time would be the date that this Court rendered its decision in *Bruton,* May 20, 1968.[6]

A failure to adopt such a rule would have a substantial impact upon the administration of justice. In California, there is a legislative policy in favor of joint trials. California Penal Code section 1098; *People v. Lara,* 67 Cal. 2d 365, 394, 62 Cal. Rptr. 586, 606 (1967). In *Spencer v. Texas, supra,* at 562, this Court recognized that there was a valid governmental interest in joint trials. As a result, many joint trials were tried under the old procedure. To now apply the new constitutional standard of *Bruton* to those cases would cause havoc in the administration of justice.

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[6]The trial in the instant case was tried in June and July of 1965. Respondent contends that in view of the state of law at the time of the trial, the trial court was eminently justified in relying upon *Delli Paoli.*

The beneficiaries of such a result would of necessity be those who acted in concert with other offenders; gang members and members of criminal conspiracies. Those persons who would derive the greatest benefit from a holding of compelled retroactivity are those felons under long-term sentences who have been confined over extended periods of time, since their cases would afford the least likelihood of a successful retrial. To require a general release of such prisoners would cripple the orderly administration of criminal law. We respectfully submit that this Court should hold that the rule established in *Bruton* is not available to retroactively attack a judgment of conviction.

Conclusion

We respectfully urge this Court to reconsider its retroactivity ruling in *Roberts v. Russell,* 392 U.S. 293 (1968). It is our feeling that the former procedure did not create a grave risk of convicting innocent defendants, thereby affecting the reliability of the fact-finding process. State and federal prosecutors have justifiably relied upon over seventy years of precedent by this Court holding that any prejudice resulting from a codefendant's statement can be cured by instructions to the jury. To apply the new constitutional standard of *Bruton v. United States,* 391 U.S. 123 (1968) to cases tried under the old procedure would cause havoc in the administration of justice.

The extrajudicial statements of the three codefendants do not fall within the ban of *Bruton.* Since

Rhone was cross-examined by petitioner Harrington's counsel, the admission of Rhone's confession does not violate petitioner's Sixth Amendment rights. The extrajudicial statements of Bosby and Cooper only refer to a "male white," "Caucasian," etc. and do not necessarily implicate petitioner Harrington. In fact, the description of the white man in Bosby's statement does not fit petitioner Harrington.

The vast majority of the cases which have discussed the issue have held that the *Bruton* rule is subject to a harmless error standard. Both logic and sound policy support the majority view. There are significant variables in each extrajudicial statement with respect to their inculpating effect and whether they added critical weight to the prosecution's case.

Under the harmless error standard enunciated in *Chapman v. California,* petitioner Harrington was not prejudiced by the admission of the three codefendants' extrajudicial statements. As noted before, petitioner Harrington was not denied his Sixth Amendment right of confrontation to codefendant Rhone's confession since Rhone testified in his own defense and was cross-examined by petitioner Harrington's trial counsel. The extrajudicial statements of Bosby and Cooper were extremely limited in detailing the white man's role in the robbery. In view of the lack of specificity in the statements of the latter two codefendants and the exceedingly strong prosecution evidence, the admission of these statements was harmless as to petitioner Harrington.

For the foregoing reasons, the judgment of conviction should be affirmed.

Dated: Los Angeles, California, February 1, 1969.

Respectfully submitted,

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APPENDIX.

United States Constitution.

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code.

Title 28

28 U.S.C. § 1257 (1964), 62 Stat. 929 (1949)

§ 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of the statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

28 U.S.C. § 2111 (1964), 63 Stat. 105 (1949).

Rhone was cross-examined by petitioner Harrington's counsel, the admission of Rhone's confession does not violate petitioner's Sixth Amendment rights. The extrajudicial statements of Bosby and Cooper only refer to a "male white," "Caucasian," etc. and do not necessarily implicate petitioner Harrington. In fact, the description of the white man in Bosby's statement does not fit petitioner Harrington.

The vast majority of the cases which have discussed the issue have held that the *Bruton* rule is subject to a harmless error standard. Both logic and sound policy support the majority view. There are significant variables in each extrajudicial statement with respect to their inculpating effect and whether they added critical weight to the prosecution's case.

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